

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
 )  
Amendment of Parts 22 and 90 of the ) RM-11311  
Commission's Rules to Reallocate Certain 150 )  
MHz Public Mobile Radio Service Frequencies )  
to the Public Safety Services )

**To: The Commission**

**OPPOSITION TO PETITION FOR RULEMAKING**

**CONCERNED PART 22 CARRIERS**

Communications Sales & Service, Inc.  
Com-Nav, Inc. d/b/a Radiotelephone of Maine  
Cook Telecom, Inc.  
DAJ-JAJ-LLC  
Lubbock Radio Paging Service, Inc.  
Mobile Communication Service, Inc.  
Mobile Phone of Texas, Inc.  
Redi-Call Communications Company  
Robert F. Ryder d/b/a Radio Paging Service  
Salisbury Mobile Communications, Inc.  
SEMA-PHOON, Inc. d/b/a R.A. Communications  
Thomas W. Tittle d/b/a Calumet Radio Dispatch

By: Harold Mordkofsky  
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Filed: February 27, 2006

## Table of Contents

Summary	ii
I. Background	2
II. The Petition for Rulemaking is Procedurally Defective and Should Be Dismissed.	4
III. If Not Dismissed, the Petition Should be Denied.	5
A. Ample Spectrum Allocations Exist to Meet Future Public Safety Demands for Spectrum.	5
B. Even if Public Safety Entities Cannot Meet Their Spectrum Needs with the Currently Available Public Safety Spectrum, Congress and the Commission Have Established Ad-Hoc Mechanisms for Public Safety Entities to Obtain Additional Spectrum Outside their Normal Allocations.	8
C. Icom's Justification that Paging Carriers Do Not Require Additional Spectrum is Misplaced.	11
D. The Public Interest Is Not Served by a Reallocation of the Part 22 150 MHz Frequencies.	13
IV. If the Commission is Inclined to Make Licensing Changes in Part 22, It Should Permit Site-by-Site Licensing for All Eligible Entities.	14
Conclusion	15

## SUMMARY

The Concerned Part 22 Carriers oppose the captioned Petition for Rulemaking ("Petition") filed by Icom America, Inc. ("Icom"). At the outset, the Petition is procedurally defective inasmuch as it fails to provide the text or substance of the proposed rule amendment or rules to be repealed in furtherance of its proposal for reallocation of certain 150 MHz band frequencies to public safety. Accordingly, the captioned petition should be dismissed as defective.

If not dismissed, the Petition should nonetheless be denied as contrary to the public interest. Icom has failed to demonstrate a compelling need for the proposed nationwide frequency reallocation to public safety, especially in light of the allocation of 28.5 MHz of spectrum in the 700 and 800 MHz bands and 50 MHz in the 4.9 GHz band, added to the Commission's decision to move the Public Safety Pool narrowbanding deadline up by five years, to January 1, 2013. Thus, since Icom filed its petition in 2004, its assumptions regarding the time-table for narrowbanding and the availability of the 700 MHz band have been overtaken by events at the Commission that will have the effect of making more spectrum available for public safety use more quickly than previously anticipated. As a result, there is ample spectrum available to meet the present and future demands for public safety communications.

In addition, public safety entities are already eligible for licensing under Part 22 of the Commission's Rules without any frequency reallocation; and ad-hoc mechanisms currently exist, under Section 337(c) of the Communications Act to provide public safety entities access to needed spectrum, regardless of the band.

In addition, new technologies have been developed that will expand the capacity of existing frequency assignments and thereby increase the commercial value of the existing 150 MHz band allocation in the Paging and Radiotelephone Service in providing service to the public. Commercial interests, for whom the 150 MHz band frequencies in Part 22 of the Commission's Rules were primarily allocated, should have the benefit of these technological advances before any across-the-board reallocation is considered.

Notwithstanding the foregoing, if the Commission is inclined to make any changes in the licensing of this Part 22 spectrum, the Concerned Carriers urge the Commission to open the Part 22 frequencies to site-by-site licensing by all eligibles under Part 22 of the Commission's Rules.

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Communications Sales & Service, Inc. (Weatherford, TX), Com-Nav, Inc. d/b/a Radiotelephone of Maine (Brewer, ME), Cook Telecom, Inc. (San Rafael, CA), DAJ-JAJ-LLC (Helena, MT), Lubbock Radio Paging Service, Inc. (Lubbock, TX), Mobile Communication Service, Inc. (Meadville, PA), Mobile Phone of Texas, Inc. (Wichita Falls, TX), Redi-Call Communications Company (Georgetown, DE), Robert F. Ryder d/b/a Radio Paging Service (Boise, ID), Salisbury Mobile Communications, Inc. (Salisbury, MD), SEMA-PHOON, Inc., d/b/a R.A. Communications (Opelika, AL) and Thomas W. Tittle d/b/a Calumet Radio Dispatch (Portage, IN), a group of Concerned Part 22 Carriers ("Concerned Carriers"), by their attorneys, hereby submit, pursuant to Section 1.405 of the Commission's Rules, these comments in opposition to the captioned Petition for Rulemaking ("Petition") filed by Icom America, Inc ("Icom"), the U.S. distributor for a Japanese radio equipment manufacturer.

As a preliminary matter, it is submitted that the Petition is procedurally defective and should be dismissed for that reason alone. Thus, the Petition fails to provide the text or substance of the proposed rule amendment or rule to be repealed in furtherance of its proposal for the reallocation of certain 150 MHz band frequencies to public safety. If not dismissed, the Petition should be denied because Icom has failed to establish the need by public safety entities generally for the frequency spectrum involved or how the public interest would be served by depriving all Part 22 eligibles, other than public safety entities, of access to spectrum in the 150 MHz band that has been allocated primarily for commercial use and which remains commercially viable. Moreover, the Petition overlooks the availability of other spectrum that will likely be more useful to the public safety community in meeting its present and future needs and the fact that Congress has provided a mechanism for public safety entities to obtain spectrum on a case-by-case basis outside normal public safety spectrum allocations and outside of the auction process. Notwithstanding the foregoing, if the Commission is inclined to make any changes in the way the Part 22 spectrum is licensed, the Concerned Carriers urge the Commission to open the Part 22 frequencies to site-by-site licensing by all eligibles under Part 22 of the Commission's Rules.

## **I. Background**

The Concerned Carriers is a group, representing a large cross-section of America, comprised of small and medium-sized Commercial Mobile Radio Service (CMRS) carriers in the Paging and Radiotelephone Service under Part 22 of the Commission's Rules. They meet the definition of "small business" or "very small business" under the

Commission's Rules and those of the Small Business Administration.<sup>1</sup> These carriers provide paging and messaging services and dispatch services to a variety of markets that might otherwise go unserved. Paging customers encompass an array of public safety, business and professional interests. These customers rely on their services as an efficient, reliable, and low-cost means of communications, despite the general availability of cellular and broadband Personal Communications Services (PCS) in the markets they serve.

Nonetheless, paging carriers are not insulated from the intense competition from cellular, ESMR and PCS carriers that began in the mid-1990s. Digital transmission capability has allowed cellular, ESMR and broadband PCS carriers to provide paging-type service to their two-way customers as an add-on service. Despite dwindling profits and narrower profit margins, many small and medium-sized paging carriers have managed to survive at a time when their larger, better financed rivals in the paging industry have not been so fortunate. These largely family owned and operated businesses (some multi-generational) have managed to retain some measure of customer loyalty because they have strong roots in the communities they serve and because they place a great deal of emphasis on providing good customer-oriented service. Icom's rulemaking

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<sup>1</sup> The Regulatory Flexibility Act (5 U.S.C. 601 et seq.), and the Small Business Administration define a "small business" in the telecommunications industry as one that has fewer than 1,500 employees and is not "dominant" in its field of operations. The Commission's paging spectrum auction rules, 47 C.F.R. §22.223, define a "small business" as one having attributable average gross revenues of \$15 million or less for the preceding three years and a "very small business" as one having attributable average gross revenues of \$3 million or less for the previous three years.

proposal would deprive these entities of access to spectrum that has traditionally been used for Commercial Mobile Radio Service (CMRS) and, despite having lain partially fallow in some areas for several years, now has the promise of substantial additional commercial value and service to the public, as will hereinafter be shown.

**II. The Petition for Rulemaking is Procedurally Defective and Should be Dismissed.**

Icom's Petition does not meet the procedural requirements of Section 1.401(c) of the Commission's Rules, which provides, as follows:

The petition shall set forth the text or substance of the proposed rule, amendment, or rule to be repealed, together with all facts, views, arguments and data deemed to support the action requested and shall indicate how the interests of the petitioner will be affected.

While Icom has provided facts, views and arguments in support of its proposal that the Commission amend Rule Sections 22.531, 22.561 and 90.20 of the Commission's Rules to facilitate the reallocation of "certain Part 22 150 MHz Public Mobile Radio Service Frequencies to the Public Safety Radio Services," it has not provided the required language of the proposed rule amendments or a substantive explanation of the amended rules, as required by Rule Section 1.401(c). Thus, the Petition fails to delineate the precise licensing rights contemplated by Icom for the incumbent Part 22 licensees and the future Part 90 public safety licensees. Icom's Petition merely provides a generalized discussion for the frequency reallocation, including a recommendation that incumbent paging licensees (site-by-site and geographic market area) be grandfathered and that

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public safety frequency advisory committees be required to provide interference protection to such licensees pursuant to existing Commission Rules.

For example, Icom's discussion does not provide specific details as to how public safety licensees would be licensed in the band, the methods that public safety advisory committees would be required to employ in order to ensure interference-free operation to incumbent paging licensees,<sup>2</sup> whether such spectrum would be licensed on an exclusive basis utilizing the existing Part 22 interference rules or whether the spectrum would be classified under the Part 90 rules as "shared" spectrum for future Part 90 licensing. Without these specific details, neither the public nor the Commission can fully evaluate Icom's proposal. The Commission should not be expected to do the homework that Icom has failed to do. Accordingly, the captioned petition should be dismissed as procedurally defective.

### **III. If Not Dismissed, the Petition Should be Denied.**

#### **A. Ample Spectrum Allocations Exist to Meet Future Public Safety Demands for Spectrum.**

If not dismissed for its procedural defect, Icom's Petition should be denied. There is no record support for Icom's bald assertion that the public safety community is "clamoring" for additional capacity in the 150 MHz band. To the contrary, it appears that in recent years, much of the public safety community has been migrating out of the VHF and UHF bands into the 800 MHz band. While there may be areas where there is a need

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<sup>2</sup> In this regard, the Commission can take official notice that its licensing databases are not guaranteed as accurate, and therefore the potential exists that properly authorized Part 22 operations may be inadvertently omitted from the Universal Licensing System (ULS) database despite the Commission's recent spectrum audit and licensee requests for correction of licenses.



by some municipalities for additional capacity in the 150 MHz band, Icom has failed to demonstrate an across-the-board demand by public safety for additional 150 MHz capacity that would justify the radical frequency reallocation it proposes. With the problems of state-wide and region-wide interoperability, the public safety community can no longer rely on the crowded and segmented VHF and UHF bands for needed expansion. Accordingly, the Commission has allocated additional spectrum in the higher frequency bands for public safety use. Nonetheless, Icom asserts that the reallocation of certain 150 MHz band frequencies is necessary to meet the public safety demand for additional spectrum because the availability of 700 MHz, additional 800 MHz and 4.9 GHz public safety spectrum are many years away and because such equipment is not compatible with existing incumbent equipment (Petition at 4).

However, on August 6, 2004, the Commission adopted an order in WT Docket No. 02-55 which resulted in the reshuffling of the 800 MHz band in order to eliminate the potential for harmful interference to public safety operations from cellularized 800 MHz facilities. This Order provided public safety services with an additional 4.5 MHz of spectrum in the 800 MHz band once the rebanding is completed. While acknowledging this momentous development (Petition at 4), Icom fails to recognize that this development is antithetical to its proposal.

In addition, the Commission has allocated 24 MHz of spectrum in the 700 MHz band for public safety operations (both narrow band and wide band operations). On February 8, 2006, President Bush signed legislation that requires broadcasters to clear the 700 MHz airwaves no later than February 17, 2009, after which time the spectrum will

become immediately allocated, on a nationwide basis, to public safety. In many areas of the United States, Regional Planning Committees have been established to facilitate the coordination and ultimate licensing of public safety systems in the 700 MHz band which, among other benefits, will ensure needed interoperability. And, several of these committees have already submitted proposed public safety plans that have been the subject of public comment and/or approval.<sup>3</sup> As public safety entities migrate to these newly allocated 700 and 800 MHz channels, it is anticipated that many of the incumbent public safety channels will be released for relicensing; thereby allowing those licensees that desire to remain in the 150 MHz band to obtain additional capacity.

Furthermore, in the period since Icom filed the Petition, the Commission has issued an order mandating that Public Safety Radio licensees in the 150-174 MHz and the 421-512 MHz bands complete their migration to 12.5 kHz narrowband technology by January 1, 2013, rather than January 1, 2018.<sup>4</sup>

Finally, in the *Second Report and Order and Further Notice of Proposed Rulemaking*, in WT Docket 00-32,<sup>5</sup> the Commission allocated 50 MHz of spectrum in the 4.9 GHz band for fixed and mobile services and designated the band for use in support of public safety. The Commission said that this would provide public safety users with additional spectrum to support new broadband applications such as high-speed

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<sup>3</sup> The Commission can take official notice that it has released public notices inviting comments on Region Nos. 24, 22 and 39 and announcing the approval of the 700 MHz public safety plan for Region 19.

<sup>4</sup> Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended, Third Memorandum Opinion and Order, Third Further Notice of Proposed Rulemaking and Order, 19 FCC Rcd 25045, para. 13 (2004).

<sup>5</sup> 17 FCC Rcd 3955, 26 CR 50, released February 27, 2002.

digital technologies and wireless local area networks for incident scene management and that the spectrum would also support dispatch operations and vehicular/personal communications.

Thus, reuse of the existing 150 MHz public safety band, together with the allocation of 28.5 MHz of spectrum in the 700 and 800 MHz bands and 50 MHz in the 4.9 GHz band added to the FCC's decision to move the Public Safety Pool narrowbanding deadline up by five years to January 1, 2013, all provide ample spectrum to meet the present and future needs of public safety entities. Accordingly, a nationwide reallocation of certain 150 MHz band channels from the Paging and Radiotelephone Service is unnecessary and contrary to the public interest.

**B. Even if Public Safety Entities Cannot Meet Their Spectrum Needs with the Currently Available Public Safety Spectrum, Congress and the Commission Have Established Ad-Hoc Mechanisms for Public Safety Entities to Obtain Additional Spectrum Outside their Normal Allocations.**

As a further indication that there is no compelling need for the proposed across-the-board reallocation, public safety entities that cannot obtain needed spectrum within currently available public safety allocation are now able to obtain spectrum allocated to other services, pursuant to the Commission's elimination of eligibility restrictions in Part 22 of its Rules and pursuant to Section 337(c) of the Communications Act of 1934, as amended (the "Act").

On February 22, 2005, the Commission amended Section 22.7 of its rules to eliminate the common carrier eligibility requirement for the Public Mobile Services by substituting the word "licensee" for the words "common carrier." In so doing, the

Commission agreed that common carrier status would “‘be viewed as an option, rather than a requirement for Part 22 licensees,’ and the election of common carrier status should still entail protections to CMRS providers.” Biennial Regulatory Review – Amendment of Parts 1, 22 and 90 of the Commission’s Rules, Report and Order and Notice of Proposed Rule Making, 20 FCC Rcd 4403 para. 103 (2005). As a result of this amendment, Part 22 spectrum may be utilized by any licensee that is otherwise legally, financially, and technically qualified, including public safety entities. *See* Rule Section 22.7. Public safety entities are therefore eligible to apply for spectrum allocated to the Part 22 services and no longer require rule waivers if their proposed operations would otherwise comply with Part 22 of the Commission’s Rules.

In addition, Section 337(c) of the Act provides public safety entities with the mechanism to obtain spectrum outside the specific public safety allocations. In this regard, Section 337(c) of the Act provides, as follows:

(c) Licensing of Unused Frequencies for Public Safety Services.—

(1) Use of unused channels for public safety services.--Upon application by an entity seeking to provide public safety services, the Commission shall waive any requirement of this Act or its regulations implementing this Act (other than its regulations regarding harmful interference) to the extent necessary to permit the use of unassigned frequencies for the provision of public safety services by such entity. An application shall be granted under this subsection if the Commission finds that—

(A) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;

- (B) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations;
- (C) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made;
- (D) the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted; and
- (E) granting such application is consistent with the public interest.

Congress enacted Section 337(c) of the Act to address circumstances where allocated public safety spectrum is not available to “satisfy the requested public safety use.” In order to obtain unused spectrum, the public safety entity is required to file an application which demonstrates that the proposed use will comply with the requirements of Section 337(c) of the Act. Provided that these demonstrations can be made, the Commission is required to waive its rules (with the exception of interference protection rules) and grant the public safety application.<sup>6</sup> Traditionally, the Commission has more or less routinely granted these applications. Accordingly, a blanket reallocation of these certain 150 MHz VHF channels for public safety use is both unnecessary and contrary to the intent of Congress in enacting Section 337(c) of the Act. Thus, Congress has made adequate provision for those isolated instances where a public safety entity has no immediate access to needed spectrum.

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<sup>6</sup> And, because the Commission amended Rule Section 22.7 to eliminate the common carrier restriction and eliminated Rule Section 22.577 which contained dispatch service restrictions, public safety entities should not require any rule waivers, provided that they comply with the technical rules of Part 22.

**C. Icom's Justification that Paging Carriers Do Not Require Additional Spectrum is Misplaced.**

Icom asserts that commercial carriers have been given ample opportunity to utilize the requested VHF paging channels by participating in the Commission's various spectrum auctions for the geographic area overlay licenses (Auctions No. 40 and 48). Icom claims, because some spectrum in some areas remained unsold following the close of Auctions No. 40 and 48, that commercial carriers did not have a need to utilize this spectrum. However, Icom's conclusion does not comport with reality. The fact is that many paging carriers and other CMRS providers are small to medium-sized businesses that have every reason to expand their existing systems, but at the same time are hard pressed to undertake the obligation to construct a system that covers at least two-thirds of the population of a geographic market area at the close of the five-year construction period.<sup>7</sup> Undertaking such an obligation, especially when profit margins are thin, does not make sound economic sense to many carriers. And, because the FCC had changed its rules in 1996 to eliminate licensing on a site-by-site basis in favor of spectrum auctions, these carriers were frozen out of acquiring the additional spectrum they required to meet local demands for service.

Over the past decade, the paging industry has dramatically declined from a highly competitive, robust industry in early 1996 to an industry that is generally characterized by lower profitability, declining subscriber bases and intense competition from other

commercial mobile radio services, including digital cellular, 800 MHz SMR cellular like services and Broadband PCS. As a result, several major paging carriers, including MobileMedia Corp., TSR Wireless, L.L.C., Arch Wireless and Weblink Wireless, Inc., have declared bankruptcy since the late 1990's. Even Metrocall, the second largest independent paging carrier in the United States, was forced to seek bankruptcy protection in 2002 in order to survive the downturn in the paging industry. See Communications Daily, 22, 73 (April 16, 2002). While this scenario might suggest, as Icom claims, that commercial interests no longer have a need for the 150 MHz band spectrum in Part 22, nothing could be further from the truth.

With the proliferation of cellular technologies, the commercial value of the 150 MHz band spectrum has been limited by the fact that these channels, using conventional modulation, are limited to a single voice channel, or at most four voice channels with narrow banding down to 6.25 kHz. In recent years, however, scientists and engineers have been placing increasing emphasis on improving spectral efficiency as the usable frequency spectrum has become all but used up.

For example, xG Technology, LLC, a research and development firm headquartered in Sarasota, Florida, has developed a novel broadband wireless system known as xMax™ using a patented technique that the company characterizes as “a fundamental paradigm shift in the way radio signals are modulated and demodulated.” In November of 2005, the company held a public demonstration of the xMax™ technology for the media and investors in Ft. Lauderdale, Florida. In that demonstration, an xMax™

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*See* Section 22.503(k)(2) of the Commission's Rules.



equipped transmitter broadcast a 3.67 Mbps signal more than 18 miles using only 35 milliwatts of RF output power in a narrow band channel.<sup>8</sup> Although no commercial products employing the xMax™ technology are yet available, it appears that commercial development of the technology is not far off. While there can be no absolute certainty in this regard, it seems likely that implementation of this new technology in the 150 MHz band will accommodate the provision of new “broadband” services to the public, thereby increasing the commercial value of this spectrum considerably. At the same time, the technology will provide additional capacity for the public safety community in their existing 150 MHz band frequency assignments. Accordingly, xMax™ and perhaps other new technologies may be expected to substantially alleviate the need for additional spectrum, both for commercial and public safety utilization. It would be a cruel irony indeed if commercial service providers were to be deprived of spectrum allocated for their use just when it appears that this spectrum, after a brief period of partially lying fallow in some areas, now holds the promise of increasing commercial value.

**D. The Public Interest Is Not Served by a Reallocation of the Part 22 150 MHz Frequencies.**

As demonstrated above, a grant of the captioned petition is not in the public interest when balancing the unsupported allegations of benefit claimed by Icom against the interests of commercial carriers in retaining access to the 150 MHz band under Part 22. Indeed, it seems odd that the proposed reallocation was advanced by Icom, the U.S. distributor for a Japanese manufacturer of land mobile equipment in the 150 MHz band,

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<sup>8</sup> For further information, go to [www.xgtechnology.com](http://www.xgtechnology.com).



and not by public safety entities or their national associations. Given the total lack of justification for the nationwide frequency reallocation proposed by Icom, the Commission should view Icom's petition for what it is – a maneuver to sell more of its parent's equipment in the U.S. Accordingly, because Icom has not demonstrated that a grant of the Petition would serve the public interest, the Petition should be denied.

**IV. If the Commission is Inclined to Make Licensing Changes in Part 22, It Should Permit Site-by-Site Licensing for All Eligible Entities.**

As Icom has correctly observed, there are still unsold licenses for the Part 22 frequencies despite recent spectrum auctions. As a result, the Commission is faced with the decision of holding additional spectrum auctions (given the likely increase in value of the spectrum involved) or opening the unlicensed spectrum to site-by-site licensing to all Part 22 eligibles, which now include public safety entities. If the Commission decides not to hold further auctions for the Part 22 frequencies, the Concerned Carriers urge the Commission to open this spectrum for site-by-site licensing on a co-primary basis for all eligible applicants, both commercial and private, including public safety. This should provide for the most efficient use of all Part 22 spectrum, not just the spectrum in the 150 MHz band.

The Concerned Carriers recognize that if the Part 22 spectrum is opened for site-by-site licensing by all Part 22 eligibles, there is the potential for mutually exclusive applications. In order to minimize the potential, the Concerned Carriers recommend that applications be considered mutually exclusive only if filed on the same day. Any subsequently filed applications would be cut-off from consideration. In this way, there

would be certainty in the licensing process, especially since multiple applicants could file for the same spectrum. To further eliminate the likelihood of mutually exclusive applications, the Commission should require electronic filing in the Commission's Universal Licensing System. This would allow the public to be aware of application filings even before the applications are listed on Public Notice as accepted for filing.

The expansion rights proposed herein for commercial carriers are necessary to allow incumbent service providers to meet demands for new services both within and without their existing service areas, as well as to relocate facilities when necessary in a reasonable manner without the artificial constraints imposed by the Commission's 1996 elimination of site-by-site applications.

### **Conclusion**

For the reasons stated herein, the Commission should dismiss the Petition, as defective. If the Petition is not dismissed as defective, it should be denied as inconsistent with the public interest because: (a) ample spectrum allocations exist to meet present and future public safety needs, (b) public safety entities are now eligible for licensing under Part 22 of the rules and, in addition, ad-hoc mechanisms exist, pursuant to Section 337(c) of the Act, to permit public safety entities in appropriate circumstances to obtain unlicensed Part 22 spectrum on an as-needed-basis outside the auction process; and (c) Icom's justification that the unlicensed Part 22 spectrum in the 150 MHz band is not needed to meet the spectrum needs of commercial service providers is misplaced, especially in light of new technologies that will expand the capacity of existing frequency assignments and thereby increase the commercial value of this spectrum in providing

service to the public (which will also redound to the benefit of the public safety community). Finally, if the Commission is inclined to make any changes in the way the Part 22 frequencies are licensed, it should allow for site-by-site licensing of this spectrum on a co-primary basis among all Part 22 eligibles.

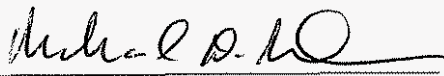
Respectfully submitted,

**CONCERNED PART 22 CARRIERS**

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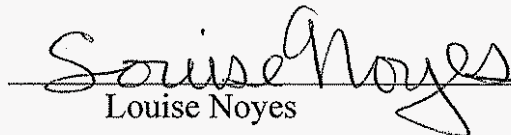
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**CERTIFICATE OF SERVICE**

Louise Noyes hereby certifies that she is employed in the law offices of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP; and that on the 27<sup>th</sup> day of February, 2006, she mailed, by first-class mail postage prepaid, a copy of the foregoing Opposition to Petition for Rulemaking to the following:

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